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THE DISSEISIN OF CHATTELS.

III.[1]

INALIENABILITY OF CHOSES IN ACTION.

THE rule that a *chose* in action is not assignable was a rule of the widest application. A creditor could not assign his debt. A reversioner could not convey his reversion, nor a remainder-man his remainder. A bailor was unable to transfer his interest in a chattel. And, as we have seen, the disseisee of land or chattels could not invest another with his right to recover the *res* or its value. In a word, no right of action, whether a right *in rem* or a right *in personam*, whether arising *ex contractu* or *ex delicto*, was assignable either by act of the party or by operation of law.

A right of action for the recovery of land or chattels, or of a debt which, like land or chattels, was regarded as a specific *res*, did, indeed, descend to one's representative in the case of death. But this was hardly a departure from the rule, since the represen-

[1] The writer has discovered a further illustration, which should be added to those given in a preceding number of this REVIEW, in support of the principle that a wrongful possessor acquires title whenever the injured owner's right of action is barred. If a disseisee levied a fine, nothing passed to the conusee, but the fine barred the conusor's right. The disseisor, therefore, gained an absolute title. 2 Prest. Abs. 206.

tative was looked upon as a continuation of the *persona* of the deceased.[1]

There were, however, a few exceptions to the rule. The king, as might be supposed, could grant or receive the benefit of a *chose* in action. So, too, a reversion or a remainder was transferable by fine in the king's court,[2] or by a customary devise, which, when recorded in the local court, operated like a fine.[3] Again, certain obligations, by the tenor of which the obligor expressly bound himself to the obligee and his assigns, could be enforced by a transferee. If, for instance, one granted an annuity to A. and his assigns, or covenanted to enfeoff A. and his assigns, or made a charter of warranty to A. and his assigns, the assignee was allowed to bring an action in his own name against the grantor,[4] covenantor,[5] and warrantor,[6] respectively.

The significance of this exception lies in the fact that it goes far to explain the reason of the rule which prohibits the assignment of rights of action in general. The traditional opinion that

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[1] The ancient appeals of battery, mayhem, imprisonment, robbery, and larceny were actions for vengence, and from their strictly personal character naturally died with the party injured. Trespass for a personal injury and *de bonis asportatis*, and *quare clausum fregit*, being for the recovery of damages only, also came within the maxim *actio personalis moritur cum persona*. By St. 4 Edw. III., c. 7, an executor was allowed to recover damages for goods taken from the testator by a trespass. And such has been the elasticity of this statute that under it actions for a conversion, for a false return, for infringement of a trademark, for slander of title, for deceit,—in short, actions for any tort whose immediate effect is an injury to or a diminution of another's property, have been held to survive. But not actions for torts which directly affect the person or reputation, and only indirectly cause a loss of property. In the United States the argument that a wrong-doer ought not to profit by the death of his victim, has led to legislation greatly increasing the actions that survive.

[2] Attornment was necessary before the conusee could distrain or bring an action against the tenant for services or rent. But the tenant could be compelled to attorn by the writs *Quid juris clamat*, and *Per quæ servitia*. 2 Nich. Britt. 46–48.

[3] Y. B. 19 H. VI. 24–47; Co. Lit. 322 a.

[4] 1 Nich. Britt. 269–270; Maund's Case, 7 Rep. 28 b; Co. Lit. 144, Butler's note [236]; Scott *v.* Lunt, 7 Pet. 596.

[5] (1233) 2 Bract. Note Book, pl. 804; Y. B. 21 Edw. I. 137; Old Nat. Br., Rast. L. Tr. 67; Fitz. Nat. Br. 145.

[6] (1233) 2 Bract. Note Book, pl. 804; Bract. f. 37 b, 381 b, 390, 391; 1 Nich. Britt. 255–256; (1285) Fitz. Ab. Garr. 93. These citations from Bracton are hardly reconcilable with the interpretation which Mr. Justice Holmes has given in "The Common Law" (pp. 373–4) of an obscure and possibly corrupt passage in Bracton, f. 17 b. In view of Professor Brunner's investigations (*Zeitschrift f. d. gesammte Handelsrecht*, Vol. 22, p. 59, and Vol. 23, p. 225), the distinguished judge would doubtless be among the first to correct his remark on p. 374: "By mentioning assigns the first grantor did not offer a covenant to any person who would thereafter purchase the land."

this rule had its origin in the aversion of the "sages and founders of our law" to the "multiplying of contentions and suits"[1] shows the power of a great name for the perpetuation of error. The inadequacy of this explanation by Lord Coke was first pointed out by Mr. Spence.[2] The rule is not only older than the doctrine of maintenance in English law, but is believed to be a principle of universal law.

A right of action in one person implies a corresponding duty in another to perform an agreement or to make reparation for a tort. That is to say, a *chose* in action always presupposes a personal relation between two individuals. But a personal relation in the very nature of things cannot be assigned. Even a relation between a person and a physical thing in his possession, as already stated,[3] cannot be transferred. The thing itself may be transferred, and, by consent of the parties to such transfer, the relation between the transferror and the thing may be destroyed and replaced by a new but similar relation between the transferee and the *res*. But where one has a mere right against another, there is nothing that is capable of transfer. The duty of B. to A., whether arising *ex contractu* or *ex delicto*, may, of course, be extinguished and replaced by a new and coextensive duty of B. to C. But this substitution of duties can be accomplished only in two ways: either by the consent of B., or, without his consent, by an act of sovereignty. The exceptions already mentioned of assignments by or to the king, and conveyances of remainders and reversions in the King's Court, are illustrations of the exercise of sovereign power. Further illustrations are found in the bankruptcy laws which enable the assignee to realize the bankrupt's *choses* in action,[4] and in the Statute 4 and 5 Anne, c. 16, which abolished the necessity of attornment.

When the substitution of duties is by consent, the consent may

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[1] Lampet's Case, 10 Rep. 48 a.

[2] "But in regard to *choses* in action, as the same doctrine has been adopted in every other state of Europe, it may be doubted whether the reason, which has been the foundation of the rule everywhere else, was not also the reason for its introduction in this country; namely, that the credit being a personal right of the creditor, the debtor being obliged toward that person could not by a transfer of the credit, which was not an act of his, become obliged towards another." 2 Spence, Eq. Jur. 850. See also Pollock, Contracts (5 ed.) 206; Holmes, Common Law, 340–341; Maitland, 2 L. Q. Rev. 495.

[3] *Supra*, 315.

[4] In general, whatever would survive to an executor passes to the assignee of a bankrupt.

be given either after the duty arises or contemporaneously with its creation. In the former case the substitution is known as a novation, unless the duty relates to land in the possession of a tenant, in which case it is called an attornment. A consent contemporaneous with the creation of the duty is given whenever an obligation is by its terms made to run in favor of the obligee and his assigns, as in the case of annuities, covenants, and warranties before mentioned, or to order or bearer, as in the case of bills and notes and other negotiable securities. Here, too, on the occasion of each successive transfer, there is a novation by virtue of the obligor's consent given in advance; the duty to the transferror is extinguished and a new duty is created in favor of the transferee.

The practice of attornment prevailed from time immemorial, but was confined to the transfer of reversions and remainders. Novation, although now a familiar doctrine, was, if we except the case of obligations running to the obligee and his assigns, altogether unknown before the days of *assumpsit* upon mutual promises.[1] The field for the substitution of duties by consent was therefore extremely limited, and in the great majority of cases a creditor would have found it impossible to give another the benefit of his claim had not the ingenuity of our ancestors devised another expedient, namely, the letter of attorney. By such a letter, the owner of a claim appointed the intended transferee as his attorney, with power to enforce the claim in the appointor's name, but to retain whatever he might recover for his own benefit. In this way the practical advantage of a transfer was secured without any sacrifice of the principle of the inalienability of *choses* in action.[2]

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[1] The *rationale* of this doctrine is as follows: The so-called assignee of a claim is in reality an attorney with a power to sue for his own use. Being thus *dominus* of the *chose* in action, he enters into a bilateral contract with the obligor, promising the latter never to enforce his claim in return for the obligor's promise to pay him what is due thereon. This promise of perpetual forbearance operates as an equitable release of the old claim, and also as a consideration for the obligor's new promise.

[2] In 1 Lilly's Ab. 125, it is said: "A statute merchant or staple, or bond, etc., can not be assigned over to another so as to vest an interest whereby the assignee may sue in his own name, but they are every day transferred by letter of attorney, etc. Mich. 22 Car. B. R." See also Deering *v.* Carrington, 1 Lilly, Ab. 124; Shep. Touchst. (6 ed.) 240; 2 Blackst. Com. 442; Leake, Cont. (2 ed.) 1183; Gerard *v.* Laws, L. R. 2 C. P. 308, 309, per Willes, J. These letters of attorney for the attorney's own use, whether borrowed from the similar *procuratio in rem suam* of the Roman law or not, are of great antiq-

Indeed, so effectual was the power of attorney as a transfer, that, during a considerable interval, it was thought unduly to stimulate litigation, and therefore to fall within the statutory prohibition of maintenance, unless the power was executed for the benefit of a creditor of the transferror. Powers executed for the benefit of a purchaser or donee were treated as void from the beginning of the fifteenth century, if not earlier, till near the close of the seventeenth century.[1]

The objection of maintenance at length gave way before the modern commercial spirit, and for the last two centuries debts have been as freely transferable by power of attorney as any other property.[2]

By statute, in many jurisdictions, the assignee may even sue in his own name. But it is important to bear in mind that the assignee under the statute still proceeds in a certain sense as the representative of the assignor. The statute of itself works no novation. It introduces only a change of procedure.[3] A release by the assignor to the debtor, ignorant of the assignment, extinguishes all liability of the debtor to any one.

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uity. (1309) Riley, Memorials of London, 68. "Know ye that I do assign and attorn in my stead E., my dear partner, to demand and receive the same rent of forty shillings with the arrears and by distress the same to levy in my name . . . and all things to do as to the same matter FOR HER OWN PROFIT as well as ever I myself could have done in my own proper person." See also West, Symbol. § 521.

[1] Y. B. 9 H. VI. 64–17; Y. B. 34 H. VI. 30–15; Y. B. 37 H. VI. 13–3; Y. B. 15 H. VII 2–3; Penson *v.* Hickbed (1588), 4 Leon. 99, Cro. Eliz. 170; South *v.* March (1590), 3 Leon. 234; Harvey *v.* Bateman (1600), Noy. 52; Barrow *v.* Gray (1600), Cro. Eliz. 551; Loder *v.* Chesleyn (1665), 1 Sid. 212; Note (1667–1772), Freem. C. C. 145. See also Pollock, Cont. (5 ed.) 701; 1 Harv. L. Rev. 6, n. 2.

The doctrine of maintenance was pushed so far that it came to be regarded as the real reason for the inalienability of *choses* in action, and the notion became current that no contracts were assignable, not even covenants or policies of insurance and the like, although expressly payable to the obligee and his assigns. Even bills and notes were thought to derive their assignability solely from the custom of merchants. Warranties being obviously not open to the objection of maintenance continued assignable, and so did annuities, although not without question. Perkins, Convey. § 101.

[2] Formerly an express power of attorney was indispensable (Mallory *v.* Lane, Cro. Jac. 342), the notion of an implied power being as much beyond the conception of lawyers three centuries ago as the analogous idea of an implied promise. 2 Harv. L. Rev. 52, 58. To-day, of course, the power will be implied from circumstantial evidence.

[3] Accordingly an assignment in New York, where, by statute, actions must be brought by the real party in interest, will not enable the assignee to sue in Massachusetts, where the old rule that an assignee must sue in the assignor's name still prevails. Leach *v.* Greene, 116 Mass. 534; Glenn *v.* Busey, 5 Mack. 733. If the statute truly effected a change of title, the assignee, like the indorsee of a bill, could sue in his own name anywhere.

So, if the assignor should wrongfully make a second assignment, and the second assignee should collect the debt, he would keep the money, and the first assignee would get nothing.[1]

We are now in a position to consider upon principle to what extent and in what mode a disseisee's interest in land or chattels may be transferred. The disseisee, by reason of the disseisor's tort, has a right to recover the *res* from the latter by self-redress or by action. This relation between the two, as we have seen, cannot be specifically transferred to another. There is, of course, no question of novation in such a case. But the mode of transfer which proved so effectual in the case of rights *ex contractu*, is equally applicable to claims arising *ex delicto*. The disseisee has only to constitute the intended grantee his attorney with power to recover the land or chattel, and to keep for his own benefit the *res* when recovered. There is an instance of such a grant as old as the time of Richard I.: "*G. filius G. ponit loco suo J. versus Gil. . . . de placito XL. acrarum terræ in H. ad lucrandum vel perdendum et* CONCEDIT EI TOTUM JUS SUUM *quod habet in predicta terra.*"[2]

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[1] The assignee of an equitable *chose* in action, *e.g.*, a trust, of course sues in his own name without the aid of a statute. But here, too, there is no novation. If the Hibernicism may be pardoned, the assignee of a trust, like an attorney, stands in the place of his assignor, but does not displace him. A release from the assignor to the innocent trustee frees the latter's legal title from the equitable incumbrance. Newman *v.* Newman, 28 Ch. D. 674. So, if a *cestui que trust* should assign his trust first to A. and then to B., and B. should, in good faith, obtain a conveyance of the legal title from the trustee, he could hold it against A. What is true of the equitable trust is equally true of the analogous legal bailment. By judicial legislation the purchaser from a bailor is allowed to proceed in his own name against the bailee. But a bailee who, for value and in ignorance of the bailor's sale of his interest, receives a release from the latter, may keep the chattel; and if a bailor should sell his interest successively to A. and B., and B. should obtain possession from the bailee, A. could not recover the chattel from B. Upon principle and by the old precedents the bailor's interest is no more transferable than that of a creditor. Y. B. 22 Ed. IV. 10–29; Wood *v.* Foster, 1 Leon. 42, 43, pl. 54; Marvyn *v.* Lyds, Dy. 90 b, pl. 6; 2 Blackst. Com. 452. As late as 1844, that great master of the common law, Mr. Baron Parke, ruled that a purchaser from a pledgor could not maintain an action in his own name against the pledgee. The court *in banc* reversed this ruling. Franklin *v.* Neate, 13 M. & W. 481. The innovation has been followed in this country. Carpenter *v.* Hale, 8 Gray, 157; Hubbard *v.* Bliss, 12 All. 590; Meyers *v.* Briggs, 11 R. I. 180.

[2] (1134) 1 Rot. Cur. Reg. 42, cited by Brunner, 1 Zeitschrift für Vergleichende Rechtswissenschaft, 367. See also "A Boke of Presidents," fol. 86, b: "Noveritis me P. loco meo posuisse T. meum verum et legitimum atturnatum ad prosequendum . . . vice et nomine meo pro omnibus illis terris . . . vocatis W. . . quæ mihi . . . descendebant et quæ in presenti a me injuste detinentur. Necnon in dictas terras . . . vice et nomine meo ad intrandum ac plenam . . . possessionem et seisinam

The doctrine of maintenance which so long hampered the assignment of contractual rights proved an even more persistent obstacle to the transfer of rights to recover land or chattels. Indeed, in the case of land it was an insuperable obstacle in England until 1845; for up to that time the Statute 32 Henry VIII. c. 16, expressly nullified all grants by one disseised. In this country, however, the right of the grantee of a disseisee to bring a real action in the name of his grantor has, during the present century, been generally recognized.[1]

It is believed that in England, at the present day, one who is dispossessed of his chattels may so far transfer his interest as to enable the assignee to bring an action to recover the chattel or its value in the name of the assignor. But no decision has been found upon the point. In the United States the right of the transferee to sue in the transferror's name,[2] or, in jurisdictions where the real party in interest must be plaintiff, in his own name,[3] would be universally conceded.

We have thus far assumed that the dispossessed owner has nothing to transfer but a right of action or recaption; that when he is called owner, nothing more is meant than that he has the chief one of the two elements of perfect ownership, namely, the right of possession, and is, therefore, potentially owner. This assumption is conceived to be well founded, and is supported by abundant authority.[4] There are, however, a few decisions and *dicta* to the

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. . . capiendum . . . et super hujusmodi possessione sic capta et habita dictas terras . . . AD USUM DICTI T. custodiendum gubernandum occupandum et ministrandum."

[1] Steeple *v.* Downing, 60 Ind. 478; Vail *v.* Lindsay, 67 Ind. 528; Wade *v.* Lindsey 6 Met. 407; Cleaveland *v.* Flagg, 4 Cush. 76; Farnum *v.* Peterson, 111 Mass. 148; McMahan *v.* Bowe, 114 Mass. 140; Rawson *v.* Putnam, 128 Mass. 552, 553; Stockton *v.* Williams, 1 Doug. (Mich.) 546; Betsey *v.* Torrance, 34 Miss. 132; Hamilton *v.* Wright, 37 N. Y. 502; Wilson *v.* Nance, 11 Humph. 189, 191; Edwards *v.* Roys, 18 Vt. 473; University *v.* Joslyn, 21 Vt. 61; Edwards *v.* Parkhurst, 21 Vt. 472; Park *v.* Pratt, 38 Vt. 545.

[2] Stogdel *v.* Fugate, 2 A. K. Marsh. 136; Holly *v.* Huggeford, 8 Pick. 73; Boynton *v.* Willard, 10 Pick. 166; Clark *v.* Wilson, 103 Mass. 219, 222; Jordan *v.* Gillen, 44 N. H. 424; North *v.* Turner, 9 S. & R. 244.

[3] Lazard *v.* Wheeler, 22 Cal. 139; Final *v.* Backus, 18 Mich. 218; Brady *v.* Whitney, 24 Mich. 154; Grant *v.* Smith, 26 Mich. 201; Smith *v.* Kennett, 18 Mo. 154; Doering *v.* Kenamore, 86 Mo. 588; McKee *v.* Judd, 12 N. Y. 622; Robinson *v.* Weeks, 6 How. Pr. 161; Butler *v.* N. Y. Co., 22 Barb. 110; McKeage *v.* Hanover Co., 81 N. Y. 38; Birdsall *v.* Davenport, 43 Hun, 552.

[4] In addition to the early English authorities cited *supra*, pp. 34–35, see Scott *v.* McAlpine, 6 Up. Can. C. P. 302; Murphy *v.* Dunham, 38 Fed. Rep. 503, 506; Goodwyn

contrary.[1] These adverse opinions all go back to a *dictum* of Mr. Justice Story: "I know of no principle of law that establishes that a sale of personal goods is valid because they are not in the possession of the rightful owner, but are withheld by a wrong-doer. The sale is not, under such circumstances, the sale of a right of action, but it is the sale of the thing itself, and good to pass the title to every person, not holding the same under a *bona fide* title for a valuable consideration without notice; and *a fortiori* against the wrong-doer."[2] Had this unfortunate *dictum* proceeded from a less distinguished source, it probably would not have had its present following. It may be said of it that it involves a *petitio principi*, assuming without proof, and in contradiction of all precedent, that the dispossessed owner really has something more than a right of action. What this something is has never been defined, and, it is submitted, for the reason that non-existent things are incapable of definition.

Let us test this *dictum*, however, by some of its practical consequences. We will suppose that after the sale the converter, in ignorance thereof, makes full compensation to the vendor for the conversion, and receives from him a release. Will it be maintained that the converter cannot hold the chattel against the vendee? And yet if the title passed to the vendee by the sale, that title cannot be affected by a subsequent release by one who has no title. Again, we may assume that the vendor wrongfully makes a second sale, and that the second vendee, being still in ignorance of the first sale, recovers the chattel or its value from the converter. Must the second vendee surrender what he recovers to the first vendee? Surely not. But he must if the *dictum*

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v. Lloyd, 8 Port. 237; Brown *v.* Lipscomb, 9 Port. 472; Dunklin *v.* Williams, 5 Ala. 199; Huddleston *v.* Huey, 73 Ala. 215; Foy *v.* Cochran (Ala. 1889), 6 So. Rep. 685; McGoon *v.* Ankeny, 11 Ill. 558; O'Keefe *v.* Kellogg, 15 Ill. 347; Taylor *v.* Turner, 87 Ill. 296 (*semble*); Ericson *v.* Lyon, 26 Ill. Ap. 17; Stogdel *v.* Fugate, 2 A. K. Marsh. 136; Young *v.* Ferguson, 1 Litt. 298; Davis *v.* Herndon, 39 Miss. 484; Warren *v.* St. Louis Co., 74 Mo. 521; Doering *v.* Kenamore, 86 Mo. 588; Gardner *v.* Adams, 12 Wend. 297; Blount *v.* Mitchell, 1 Tayl. (N. C.) 130; Morgan *v.* Bradley, 3 Hawks, 159; Stedman *v.* Riddick, 4 Hawks, 29; Overton *v.* Williston, 31 Pa. 155.

This note and the following are a revision of note 5, *supra*, p. 35.

[1] Brig Sarah Ann, 2 Sumn. 206, 211; Tome *v.* Dubois, 6 Wall. 548; Cartland *v.* Morrison, 32 Me. 190; Webber *v.* Davis, 44 Me. 147; Clark *v.* Wilson, 103 Mass. 219, 222–3 (*semble*); Dahill *v.* Booker, 140 Mass. 308, 311 (*semble*); Serat *v.* Utica Co., 102 N. Y. 681 (*semble*); Kimbro *v.* Hamilton, 2 Swan, 190.

[2] Brig Sarah Ann, 2 Sumn. 206, 211.

under discussion is sound. Thirdly, if the title passed to the vendee, what becomes of the vendee's right of action? Surely he cannot recover the value of the chattel from the converter after he has sold it to another. But it may be urged he will be entitled to nominal damages only. Be it so. Suppose, then, that immediately after the sale the chattel is accidentally destroyed. The vendor will recover his nominal damages, the vendee will get nothing, and the converter will go practically scot free. It is possible to say, however, that the sale passes not only the title, but also the right to sue in the vendor's name for the conversion. But this hypothesis may work an injustice to the converter. If not sued for six years his title will be perfect. Suppose the sale to occur near the end of the period of limitation, and that the vendee can prove a conversion subsequent to the sale, as by a demand and refusal, the statute would run for another six years, which could not have happened in favor of the vendor if there had been no sale. In other words, the rule, *Nemo dare potest quod non habet*, would be violated.[1]

All these unsatisfactory results are avoided by the adoption of the opposite view, supported alike by precedent and general reasoning, that a right of action is the sum and substance of the interest of a dispossessed owner of a chattel. On this theory the sale of the disseisee's right of action has the same operation as the assignment of a debt. The vendee stands in the place of the grantor, but does not displace him. He cannot accordingly extend the statute of limitations to the detriment of the converter. A release by the vendor for value to the converter who is ignorant of the sale, although wrongful, extinguishes all right to recover possession from the latter, and so makes him complete owner of the chattel. And, finally, a second purchaser from the dispossessed owner, who in good faith gets the chattel from the converter, may keep it. If, furthermore, statutes existed in all jurisdictions enabling the purchaser from a dispossessed owner of a chattel to sue for its recovery in his own name, there would be a complete harmony between the requirements of legal principle and commercial convenience.

In conclusion, then, the ancient doctrine of disseisin of land and chattels was not an accident of English legal history, but a

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[1] See Overton *v.* Williston, 31 Pa. 155, 160.

rule of universal law. Brian's *dictum*, that the wrongful possessor had the property and the dispossessed owner only the right of property, rightly understood, is not a curiosity for the legal antiquarian, but a working principle for the determination of controversies for all time.

J. B. Ames.

CAMBRIDGE, 1890.

STATE JURISDICTION IN TIDE WATER.

THE debt which jurisprudence owes to passion is a heavy one. It is litigation which defines legal rules to greater precision; and litigation most frequently originates in feelings entirely remote from a desire to assist the growth of law as an abstract science, or complete its efficiency as a working system. Among these feelings, a desire to get gain, even at a little risk, easily takes high rank. On the surface, for example, there is little connection between an abundance of menhaden in the summer of 1889 and questions of constitutional law. Such a connection became evident, however, in July, 1889, when steam seining vessels, attracted by the presence of menhaden in unusual numbers, began catching them by purse seins and steam appliances in waters geographically known as Buzzard's Bay — a narrow sheet of tide water in southeastern Massachusetts. These steamers hailed from Rhode Island, were duly enrolled, and had taken out the "United States fishing license," so called. July 19, 1889, certain of the Massachusetts district police, with local aid, in a little New Bedford tugboat, boarded the "A. T. Serrell" and the "Seaconnet," two of these vessels then engaged in plying the fishing business at a point about a mile off Quisset Harbor, in the town of Falmouth, declared them seized, and afterwards arrested their crews as fishing in violation of chapter 192 of the Laws of 1886, "An Act for the protection of the Fisheries in Buzzard's Bay." This statute is substantially as follows: —

Section 1 provides that "No person shall draw, set, stretch or use any drag net, set net, or gill net, purse or sweep seine of any kind for taking fish anywhere in the waters of Buzzard's Bay within the jurisdiction of this Commonwealth nor in any harbor, cove or bight of said bay except as hereinafter provided." (These ex-